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No. 92-947

# In the Supreme Court of the United States

OCTOBER TERM, 1992

BMW OF NORTH AMERICA, INC.,
*Petitioner,*

*v.*

BIG APPLE BMW, INC., POTAMKIN BMW AND VW, INC., ROBERT POTAMKIN and ALAN POTAMKIN,
*Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents[1] respectfully file this brief to set forth reasons why the petition for a writ of certiorari should not issue pursuant to Supreme Court Rule 10.

[1] Pursuant to Supreme Court Rule 29.1, respondent corporations state that they have no corporate parents or subsidiaries.

## OPINION BELOW

The Court of Appeals' complete decision was filed under seal because it included information filed under seal in the district court. Accordingly, a redacted opinion has been published at 974 F.2d 1358 (3d Cir. 1992) and that same redacted opinion is the one furnished by BMW NA as Appendix A to its petition for certiorari. It omits certain text and footnotes contained in the full opinion, including matters germane to this petition. Respondents are therefore lodging with this Court in connection with this response the unredacted opinion, to which reference is made in this Brief.[2]

## STATEMENT OF THE CASE

BMW NA sought and obtained summary judgment in the district court, which summary judgment the Court of Appeals vacated, remanding this case for further proceedings and trial.

As set forth in more detail below, BMW NA's petition for certiorari commits these errors: (1) it states record facts only in the light most favorable to BMW NA's own position, and ignores all disputed facts, contrary to the correct summary judgment standard; (2) it improperly characterizes as "triple hearsay" evidence which the Court of Appeals specifically determined to be non-hearsay and admissible evidence; (3) it attempts to manufacture a conflict among circuit court decisions concerning "pretexts" in Sherman Section One cases, which conflict does not exist; (4) it hypothesizes a conflict between the case at bar and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), where no such conflict exists. The Court of Appeals in the present case considered at length both *Monsanto* and *Sharp*, and correctly applied their holdings.

To briefly illustrate the second of these errors, BMW NA

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[2] Citations to that opinion in this brief are designated "L" (for "lodging") and the page number of the typescript opinion. Citations to BMW NA's appendix A opinion are designed "a," and citations to the record in the Court of Appeals are designated "A," following the convention in BMW NA's petition.

claimed in the district court that an admission of the existence of a conspiracy by an employee of BMW Credit and BMW Leasing (Don Mitchell) constituted "hearsay" and was thus inadmissible against BMW NA .[3] The Court of Appeals examined this matter at length, and disagreed with BMW NA's position, finding the statement admissible against BMW NA under both F.R.Evid. 801(d)(2)(D) and 801(d)(2)(E). L 34-40; 33a-38a. In making this determination, the Court of Appeals analyzed in detail the record evidence and applied F.R.Evid. 801(d)(2)(D) and 801 (d)(2)(E) to these facts of record. *Id.* BMW NA has not challenged or sought a writ of certiorari on this evidentiary ruling, and it must be accepted as correct and controlling on this record. Notwithstanding, BMW NA has continued to dismiss this item of evidence as "triple hearsay" (petition for writ of certiorari at pp. 8-9 and 10). But it is *not* hearsay at all: the Court of Appeals so ruled, which ruling BMW NA has not challenged in its petition.

The above example, writ large, characterizes the petition. In moving for summary judgment, BMW NA invok ed a standard whereby inferences must be construed against itself, and the record read in the light most favorable to plaintiffs, the opponents of BMW NA's motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). However, BMW NA has consistently ignored that standard in its petition. Each of the factual assertions it purports to make at pp. 4-12 reflects only BMW NA's version of disputed factual issues, and matters that the Court of Appeals clearly held were disputed issues of fact.

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[3] The testimony in question reads in pertinent part:

> A. Don Mitchell [of BMW Credit and Leasing] told me that the BMW dealers in the area would not let Potamkin get the franchise because they were afraid that Potamkin's reputation of selling cars cheaper than everybody else was not something that they wanted to get involved with. They didn't want to be involved in price competition. They wanted to keep their price levels where they were and that they were going to do what they could to make sure that Potamkin did not get the franchise.
>
> Q. Did Mr. Mitchell say anything else?
>
> A. That was enough for me.

A2195-96, 2312.

### A. The Parties And Their Businesses

For example, in purporting to describe "the parties and their businesses" at pp. 4-5, BMW NA portrays a record in which BMW NA (and its existing dealers) have only unblemished, sterling reputations, and are striving to uphold only the highest possible business standards in the automobile industry, whereas, in polar contrast, plaintiffs' reputation is solely negative, and plaintiffs seeks to uphold no such standards. The inference BMW NA seeks to have this Court draw is that BMW NA's conduct at issue in the lawsuit must, therefore, have been justified by business reasons. Thus, BMW NA states that "[b]eginning in 1984, BMW NA . . . established rigorous minimum standards for the sales, service and parts operations of BMW dealers and continuously works with its dealers to ensure compliance with these standards." (Petition pp. 4-5).

BMW NA knows that the record in this case contains abundant evidence casting serious doubt on this contention, because BMW NA itself ignored, and many of its dealers openly flouted, the supposed standards with impunity: in the geographical area at issue in this lawsuit, for example, one "exclusive" BMW dealership sold used Toyotas from Hertz Rent-A-Car in its front sales area, A2145; repair space was sublet to non-BMW operations at another BMW dealership, A2115; one BMW dealer's parts accounts was seriously in arrears for long periods, A2147; another dealer refused to sign its dealer agreements and refused to purchase repair equipment which BMW claimed was essential to its operation, yet BMW continued to support this dealer, A2141; most BMW dealers did not segregate BMW parts departments from other manufacturer' parts departments, as they were theoretically supposed to do, A1909-14; many BMW dealers were located in "automobile rows," A2074, 2704-41, and so forth.

At the same time, the record contains unrefuted evidence that plaintiffs were willing, had the financial capability, and had stated the intention to BMW NA , to comply fully and completely with each and every BMW NA standard, including building brand new "stand alone" facilities dedicated solely to BMW cars. The Court of Appeals found that "an internal BMW NA document acknowledged that Robert [Potamkin] had promised

to meet all required BMW standards." L 49, 47a. As the Court of Appeals further found, "Robert [Potamkin] indicated that he had been willing to meet any BMW NA criteria, including renovations to his proposed facility, to meet standards required for a higher SPG, and had so informed Casella [of BMW NA]. A1708-09; A1719; A1999." L 55, 52a.[4] *Accord*, L 18; 18a (with respect to Long Island) "[BMW NA's] Cronin testified that the Potamkins envisioned this as an exclusively BMW franchise. . . ."

With respect to its denigrations of plaintiffs (certiorari petition p. 5), BMW NA further crosses the line. It states that plaintiffs have "a reputation marred by government investigations into . . . Potamkin business practices and service." (Petition at 5). However, the record citations given for these "government investigations" (A863-66, 972-1136) turn out to be an assurance of voluntary discontinuance in 1983 relating to a Cadillac and Toyota agency in New York concerning plaintiffs' father.[5] Since BMW NA has itself recently signed a consent decree with this very same New York attorney general for deceptive advertisements,[6] apparently BMW NA would also characterize itself as having "a reputation marred by government investigations." The point is, the record in this case shows that BMW NA's supposed scrutiny of plaintiffs' "government investigations" and "consumer complaints" was itself deliberately manipulated and skewed. As the Court of Appeals found:

> [T]here is no dispute that Robert [Potamkin]'s application was the first for which BMW NA hired a private investigator's services. A2288. Gay submitted his report directly to the Weil, Gotshal & Manges law firm and BMW NA decision-mak ers never received a copy

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[4] Similarly, existing BMW dealer Gladys Caulfield in Manhattan stated that she sought to sell her dealership to Potamkin because "it just made more sense . . . you know they had the wherewithal to really do a beautiful job and I thought that's what BMW was looking for. A1662-63." L 26; 26a.

[5] In contrast, BMW NA's contemporaneous 1985 investigation of plaintiffs in Pennsylvania, New Jersey, and Florida — locations where plaintiffs principally did business — demonstrated good credit ratings, approval by the Better Business Association, and the lack of any government investigations or actions. A974, 1087.

[6] *See Wall Street Journal*, December 11, 1992, page B9A, "New York State Finds Leasing Ads of BMW Deceptive."

> of it. A2164. Further, from the information provided to Gay at the outset of his investigation a jury could infer that BMW NA was culling prete xtual excuses to deny a Potamkin franchise. Gay testified that he was ordered to investigate consumer complaints, but not provided with favorable references furnished by Robert. A2292-98. Despite BMW NA's contention that applicant references are always favorable and therefore were considered less valuable for purposes of its investigation, Gay testified that in each subsequent investigation of a potential dealer, BMW NA furnished him with a copy of the application and he checked positive as well as negative sources.
>
> Moreover, BMW NA's thorough investigation into the Potamkins' business practices appears pretextual given its lack of interest in similarly investigating other prospective and existing dealers. For example, although Gay was asked to investigate all consumer complaints against the Potamkins, a 1981 lawsuit brought by the Pennsylvania Attorney General against several Toyota dealerships, who also owned BMW franchises, attracted no attention from BMW NA . One BMW dealer who entered into an "assurance of voluntary compliance" with the state Attorney General's Office testified that he did not receive an inquiry from BMW NA . A2040-41.

L 48-49 n. 14; 46a-47a, n. 14.

At footnote 2 p. 5, BMW NA states that its dealers participate in BMW D AG (Dealer Advertising Group) meetings and "the record is undisputed that the only thing discussed at BMW DAG meetings is advertising strategy, not price." This statement is curious, as the Court of Appeals specifically found, and the record clearly shows, that BMW dealers compare each other's sales statistics with one another at these meetings. A2742-44 and L 20.

BMW NA finally claims that "the P otamkin's organization advertising philosophy is that of a bargain basement, employing many distressed-sale items." The record shows: (a) that Potamkins advertising was similar to advertising by BMW dealers

on their other makes of cars that competed with Potamkin, (b) a dealer (Ciasulli) approved by BMW at the same time Potamkin was rejected employed advertising similar to that used by Potamkin. *Compare* e.g. A1137 (Potamkin) with A2307-08 (Ciasulli).

**B. The Events at Issue**

At pages 5-9 of its petition, BMW NA seeks to summarize the record evidence, but again does so in a highly selective, one-sided and misleading fashion. The Court of Appeals presented a comprehensive analysis of these same facts (see Appendix A at pp. 17a-54a and L 17-58) to which reference is respectfully made. To restate those would expand this brief by many pages.

However, correction of BMW NA's misstatements may be briefly made with reference to that decision and to the record. At pp. 5-6, BMW NA states with respect to Long Island that discussions were only "preliminary." However, the record contains evidence directly contradicting this statement. A645.[7] The Court of Appeals analyzed this evidence in detail at L 17-19; 17a-19a, and concluded that the record showed far more than "preliminary discussions."

The Court of Appeals also found significant, probative evidence that existing BMW dealers brought concerted pressure upon BMW NA to deny Potamkin the franchise because Potamkin would, as one dealer put it, "alter the competitive landscape," meaning that dealers would be forced to engage in price competition with each other, which would ultimately benefit consumers. L 19-20; 19a-20a. BMW NA changed its course of conduct from approval of Potamkin to disapproval as a result of this concerted dealer pressure. *Id.* The Court of Appeals summarized this evidence by concluding:

> Given this sequence of events, a reasonable jury could infer that BMW NA would have welcomed a 'high volume' dealer such as Victor [Potamkin] and after succumbing

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[7] The deposition testimony reads: "We [Potamkin] were under the impression everything we wrapped up, we were appointed. We shook hands. He [Cronin, BMW NA regional officer] told us to go out and get the real estate. And that was it." A645.

> to pressure from its New York area dealers, entertained the prospect of installing a Potamkin dealership in an alternative location, Philadelphia. L 26, 25a.

With respect to that Philadelphia location, the existing BMW dealers again coalesced against plaintiffs because, as the admissible evidence reveals, the dealers "didn't want to be involved in price competition. They wanted to keep their price levels where they were and were going to do what they could to make sure Potamkin did not get the franchise." A2195-96, L 34; 33a. BMW NA at pp. 6-7 seeks to proffer a series of "business justifications" as to why Potamkin was not approved: supposed "poor reputation" (p. 7); supposed "outright refusal to sign the required form" (p. 7); supposed "adamant demand for assurances that they would receive hundreds of additional cars" (p. 7); supposed incompatible image with BMW (p. 7); supposed "uncooperative and confrontational" behavior (p. 7).

However, the Court of Appeals examined each of these in detail, and found, at a minimum, that they were disputed issues of fact or that there was no *substance* to any of BMW's purported justifications. L 32, 42-57; 39a-55a. The Court of Appeals concluded :

> [A]lthough a jury may credit BMW NA's reasons, we cannot conclude that a reasonable jury would disbelieve the Potamkins' substantial rebuttal evidence. L 41-42, 39a-40a.

The Court of Appeals first determined that evidence of concerted action was admissible and probative, (L 17-40; 16a-38a), and only thereafter examined BMW NA's supposed "independent reasons," finding there was substantial evidence casting doubt about their *bona fides* (L 41-57; 39a-55a).

## REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE

### I. There Is No Conflict As To How Evidence Of Pretextual Behavior By The Manufacturer Should Be Considered In A Sherman Section One Case

BMW NA's first reason for requesting certiorari (petition at pp. 14-23) is that the Court of Appeals in this case somehow

erred in its consideration of evidence of "pretext" by the manufacturer, BMW NA. It asserts this argument in various forms: that there is a supposed "conflict among the circuits" as to how pretexts should be considered in Sherman Section 1 cases (pp. 14-18); that the decision in the case at bar supposedly conflicts with *Monsanto*, *supra*, and *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (pp. 19-23); that "competing inferences" can be drawn from "evidence of pretext" (p. 20); that "pretextual evidence" cannot be relied upon as "proof of conspiracy" (p. 21); and that the decision in this case "subverts the principles of summary judgment" (pp. 22-23).

Underlying all of BMW NA's arguments is a fallacious view of how evidence of "pretext" was viewed by the Court of Appeals in this case. BMW NA misstates that matter, claiming that the Court of Appeals substituted evidence of "pretext" by BMW NA for evidence of "concerted action":

> Contrary to the rulings of several courts of appeals, the Third Circuit concluded that evidence of pretextual reasons, in and of itself, qualified as evidence of concerted action.

Petition at 11. That is incorrect. The Court of Appeals in this case engaged in a careful, analytically rigorous analysis of the evidence of concerted action (L 17-40; 16a-38a), including evidence of the concerted pressure which BMW dealers organized and exerted upon BMW NA, and BMW NA's shift in its course of conduct as a result of this pressure. The court concluded that there "was sufficient evidence from which a reasonable jury could find concerted action in violation of section one of the Sherman Act" (L 40; 38a). BMW NA has not sought review of that determination or the evidentiary rulings upon which it is based.

The Court of Appeals then went on to consider the supposed "independent business justifications" which BMW NA had proffered, which BMW NA asserted were the "real reasons" for its conduct. The Court of Appeals extensively considered each of those supposed independent reasons (L 41-57; 39a-55a), and found there to be substantial evidence by plaintiffs that each and every reason was "pretextual," or not truthful. The Court of Appeals did not "substitute" evidence of "pretext"

for evidence of "concerted action," as BMW NA incorrectly claims. This is apparent from the structure of the opinion itself.

The Court of Appeals found that plaintiffs presented (1) admissible evidence of concerted action; *and* (2) evidence that tended to exclude the "independent justifications" asserted by BMW NA . Plaintiffs made both evidentiary showings.

With respect to the proof that BMW NA's stated business justifications were pretextual, plaintiffs, through discovery, examined each and every "independent business reason" which BMW NA put forth for rejecting the plaintiffs as dealers. Plaintiffs were able to show that BMW NA's reasons were untruthful, inaccurate, and just plain pretextual. Plaintiffs' proof of pretext is certainly relevant, probative and admissible under *Monsanto* as helping to "tend to exclude the possibility that the manufacturer . . . was acting independently." 465 U.S. at 764. It is not a substitute for evidence of concerted action. Plaintiffs did not so contend, and the Court of Appeals did not so hold.

Finally, BMW NA claims there is a "conflict among the circuits" on this issue of how evidence of pretexts should be treated. Ironically, BMW NA claims that three court of appeals decisions that preceded *Monsanto* correctly anticipated and applied *Monsanto*.[8] Petition for certiorari at 15. In contrast, the two courts of appeals which had the benefit of *Monsanto* (the court below in this case and the Ninth Circuit in *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 (9th Cir. 1986) *modified* 810 F.2d 1517 (9th Cir. 1987) supposedly failed to apply its teachings. Petition at 15.

Analytically, this is farfetched.[9] BMW NA has simply created a "straw man" in its effort to manufacture a conflict to

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[8] Those decisions are by the First Circuit in *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 857 (1st Cir. 1982); by the Second Circuit in *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. den.*, 459 U.S. 880 (1982); and by the Seventh Circuit in *Lamb's Patio Theatre, Inc. v. Universal Film Exchange, Inc.*, 582 F.2d 1068 (7th Cir. 1978). Petition for certiorari at 15.

[9] Indeed, the *Dimidowich* decision was not even decided under federal law; it was a diversity case that applied California state law. 803 F.2d at 1477 and note 1. In any event, it is not inconsistent with any of the other decisions cited.

satisfy Supreme Court Rule 10.1(a). Neither *Bruce Drug*, nor *H.L. Moore*, nor *Lamb's Patio* are inconsistent with the case at bar. *Bruce Drug* held there was *no* evidence of concerted action in the record, and that a supposed business pretext (which the court of appeals did not find to be pretextual in any event) did not prove a conspiracy. 688 F.2d at 857. That holding is consistent with: (a) *Monsanto*; (b) the case at bar; and (c) common sense. *H.L. Moore* and *Lamb's Patio* are to the same effect, both holding that a pretextual reason is not, *in and of itself*, proof of conspiracy. 662 F.2d at 943 and 582 F.2d at 1070.

It is clear that BMW NA has simply mischaracterized the decision and reasoning of the Court of Appeals in this case, in an attempt to generate a "conflict" with the above decisions where none exists.

For the above reasons, BMW NA's first ground for seeking a writ of certiorari must fail.

## II. The Court Below Correctly Followed Sharp and Monsanto

It is difficult to apprehend exactly what BMW NA is claiming as its second ground for certiorari. To the extent BMW NA appears to assert that this Court requires some special, or incremental, burden of proof in price fixing cases, this Court ruled to the contrary last term in *Eastman Kodak Co. v. Image Technical Services*, 60 U.S.L.W. 4465, 4470 (June 8, 1992):

> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiffs' theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

BMW NA does not (and could not) argue that plaintiffs' theory in this case is "economically senseless." To the contrary, as the Court of Appeals recognized, this case has both "horizontal" and "vertical" components, because the essence of the case is concerted action by blocs or groups of existing BMW dealers to pressure BMW NA not to approve the Potamkin dealerships, so that the existing dealers could preserve their price levels and hence their profit margins. The admissible evidence of record shows that the existing BMW dealers did not want to "alter the competitive landscape," (20a), as they feared Potamkin would have done, and collectively pressured BMW NA to change its course, and to disapprove the Potamkin dealership, which BMW NA did. The admissible evidence of record also shows that the existing BMW dealers wanted to "avoid price competition," (33a), and to "keep their price levels where they were," (33a), and collectively pressured BMW NA to that end. As Mr. Mitchell of BMW NA Leasing and Credit admitted:

> [The dealers] would not let Potamkin get the franchise because they were afraid that Potamkin's reputation of selling cars cheaper than everybody else was not something that they wanted to get involved with. *They didn't want to be involved in price competition. They wanted to keep their price levels where they were and that they were going to do what they could to make sure that Potamkin did not get the franchise.* 33a.

Under *Matsushita* and *Kodak*, plaintiffs' case "makes sense," and BMW NA does not contend otherwise. Similarly, the record evidence in this case supports the conclusion that the ultimate consumers would have benefitted from the competition Potamkin would have introduced, and that the retail consuming public lost the benefit of that competition. This Court has repeatedly stressed that the ultimate focus of the antitrust laws is to promote maximum competition for the benefit of consumers. "Congress designed the Sherman Act as a consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

BMW NA appears alternatively to contend that the record evidence consists only of the following two items: "BMW NA representatives and dealers share and discuss price statistics" and "BMW dealers set their collective advertising budget con-

tributions at a certain amount per BMW car sold." (Petition at 24). That does not describe the record in this case, as the Court of Appeals' decision makes clear.

To the extent that BMW NA alternatively contends that the decision by the court below is incompatible with *Monsanto*, that erroneous contention has been addressed in Point I above. The court below carefully considered and applied *Monsanto*. 13a-15a. To the extent BMW NA is contending that the decision of the court below is incompatible with *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), that is equally erroneous. The court below carefully considered the *Sharp* decision, and correctly applied it to the facts of record. 44-45a, L 46-47. As the court below stated:

> BMW NA misapprehends the legal parameter. In *Sharp*, the Court held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." Ruling after a trial in which the jury was instructed only on a *per se* theory of liability, the Court remanded the case for a new trial holding that *per se* illegality would not attach to a vertical non-price restraint and that "an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer," must be judged under a rule of reason test. 485 U.S. at 726, 736. Thus, even if this case is on all fours with *Sharp*, the Potamkins may still proceed to a jury trial under the rule of reason test.
>
> Moreover, this case has an additional horizontal component that *Sharp* lacked. In *Sharp*, a single dealer, Hartwell, pressured Sharp to terminate Business Electronics. Here the Potamkins pled in their complaint, and the evidence suggests, that a *number* of BMW dealers combined to form a group boycott to pressure BMW NA to reject Potamkin competition. The Potamkins assert that all of BMW NA's alleged reasons for rejecting them are pretextual and that until BMW dealers voiced their strenuous opposition to Potamkin competition, BMW NA had acknowledged the value of installing Potamkins as

> dealers. Thus the Potamkins present a horizontal boycott case, rather than the non-price vertical restraint suggested by BMW NA. As we fully evaluate *infra*, the evidence of record, when viewed in the light most favorable to the Potamkins, supports their proposition.
>
> *Sharp* suggests that the proper distinction between a horizontal and a vertical restraint lies in determining which kind of an arrangement produces the restraint rather than analyzing its anticompetitive effects. *Sharp*, 485 U.S. at 730 n. 4. Under either analysis, however, when viewed in the light most favorable to the Potamkins, the evidence suggests that BMW NA rejected the P otamkins as a result of dealer opposition to price competition.

L 46-47, 44a-45a (footnote omitted). The record in this case fully supports those statements.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: January 6, 1993

Respectfully submitted,

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